

TRANSCRIPT

LEGISLATIVE ASSEMBLY ENVIRONMENT AND PLANNING COMMITTEE

Inquiry into Environmental Infrastructure for Growing Populations

Melbourne—Tuesday, 20 April 2021

(via videoconference)

MEMBERS

Ms Sarah Connolly—Chair

Mr David Morris—Deputy Chair

Mr Will Fowles

Ms Danielle Green

Mr Paul Hamer

Mr Tim McCurdy

Mr Tim Smith

WITNESS

Dr Bruce Lindsay, Senior Lawyer, Environmental Justice Australia.

The CHAIR: Hi, Bruce. Welcome. Before we begin, and we will probably begin with introductions, there are a couple of things I just need to say. The first is to advise you that the sessions today are being live broadcast on the Parliament's website and rebroadcast of the hearing is only permitted in accordance with Legislative Assembly standing order 234. Thanks so much for taking the time out of your day to join us at this public hearing for the Inquiry into Environmental Infrastructure for Growing Populations.

Before we begin, I need to point out a couple of things to you. All evidence taken today will be recorded, and it is protected by parliamentary privilege. What this means is that you can feel free to speak freely without the fear of legal action in relation to the evidence that you give, but it is really important to remember that parliamentary privilege does not apply to any comments you make outside the hearing, even if you are just restating what you said here today. You will receive a draft transcript of your evidence in the next week or so to check and to approve, and corrected transcripts are published on the committee's website and may be quoted from in our final report.

Dr LINDSAY: Thank you, Chair.

The CHAIR: It is great to have you here. My name is Sarah Connolly. I am the Chair of this committee and I am the very lucky Member for Tarneit, and I am going to get my colleagues on the committee to introduce themselves.

Mr MORRIS: I am David Morris, Deputy Chair of the committee and the Member for Mornington.

Mr FOWLES: Will Fowles, the Member for Burwood.

Mr HAMER: Paul Hamer. I am the Member for Box Hill.

Ms GREEN: Apologies. Danielle Green, Member for Yan Yean, Parliamentary Secretary for Sport and Parliamentary Secretary for Regional Victoria.

The CHAIR: Bruce, do you want to start by introducing yourself and who you are speaking on behalf of today? It would be great to have a 5-minute presentation. If you have done some slides, great. If you have not, do not stress. You can just talk to us about your submission, and then, I know, members have some questions that they want to jump to and ask you and have a bit of a discussion about.

Dr LINDSAY: Chair, my name is Dr Bruce Lindsay. I am a Senior Lawyer with Environmental Justice Australia. I do have a statement that I was going to talk to at an opportune time. I do not have a presentation though.

The CHAIR: That is all right. Go for it.

Dr LINDSAY: Okay. I thank the committee on behalf of Environmental Justice Australia for the opportunity to appear before you today. EJA is a public interest environmental legal practice. We act primarily for community groups in matters concerning protection of nature and the environment. We have also long engaged in law and policy reform work aimed at strengthening and improving our environmental laws and through those laws protect the environment and its benefits. Since 2015 our legal and policy work has included projects concerned with the protection and repair of urban ecology. These matters have taken as their focus urban waterways in and around Melbourne and Geelong, which comprise the most important areas of biodiversity and environmental value in those cities. EJA's work has routinely included advice and representation to community groups in urban, peri-urban and regional areas.

The recognition, protection and restoration of nature in urban areas is fundamental to environmental infrastructure. In turn, environmental infrastructure is essential to the wellbeing and character of cities. Growth areas in Victorian cities are set within ecological contexts, albeit subject to varying and significant degrees of modification and impairment. Melbourne, for example, is situated across three major ecosystems: hills and plains to the east, the coastal zone and the basaltic plains of the west and north. These are foundations of natural infrastructure.

Scientists, community groups and biodiversity players will talk to the specific character and importance of urban ecology. My intention is to focus on relevant law and its administration. I would add that, despite high degrees of modification and impairment, cities continue to act as key biodiversity hotspots, including for rare and threatened species, and they are the places where most people know nature, including remnant wild places. That those opportunities continue to decline should seriously sound alarm bells to you as legislators.

I would like to take you first to certain general comments on the law's treatment of the urban environment before considering urban waterways, which is an area that EJA has done specific work on. To start with, urban ecology is heavily influenced by planning law and policy. There are important limitations in using planning law to manage the natural environment. First, at a foundational level planning law does not take an ecosystem approach to environmental management or decision-making. The cornerstone test of planning decisions is a form of triple bottom line known as net community benefit. Environmental considerations have no particular weight. Having evolved to regulate the orderly development of land, especially in the property market, environmental uses and natural assets typically function as constraints or encumbrances on land without transactional value. Planning policy may compel consideration of environmental matters, but they are intrinsically residual to the main outcome. Planning does not use ecological integrity or biological diversity as a foundational reference point.

Second, incentive mechanisms imposed through planning to fund key public goods such as infrastructure do not extend to environmental infrastructure. The complex schemes governing infrastructure contributions are directed overwhelmingly to conventional built infrastructure such as roads. Investment in ecological values or in green infrastructure is entirely absent from this mechanism. In EJA's proposals for a new deal for waterways in Melbourne's west we suggested dedicated arrangements for greener environmental infrastructure.

Third, key agencies responsible for development fronts and new communities, such as the Victorian Planning Authority, have no legislative mandate or even guidance to achieve sound urban ecological outcomes. Rather, the conventional model of land release and formulaic development is prioritised. In our view the *Victorian Planning Authority Act* should be reformed to embed environmental objectives and design.

Fourth, extensive use of ministerial discretion in order to enable large-scale strategic projects such as infrastructure is almost always exercised to the detriment of environmental infrastructure, even where compromise is available. Planning controls ultimately implemented for the North East Link are a good example. Remnant woodlands, re-established creek corridors and large areas of urban tree canopy will all be lost through the design of that project despite recommendations from an elaborate assessment process.

Fifth, planning does on occasion set objectives to protect, conserve or enhance environmental assets, but there is no guidance as to what this means in practice. Planning would be aided by authoritative principles and standards for ecosystem recovery and restoration and how these should inform planning outcomes. Aside from planning law, urban ecosystems should be benefiting now from implementation of reformed provisions under the *Flora and Fauna Guarantee Act*. This is Victoria's main biodiversity statute. It includes strengthened duties on all public authorities to reflect real influence of biodiversity objectives on their operations. The Act also includes reformed biodiversity and conservation tools such as protections for threatened species habitat. There appears to be no systematic or sustained effort to mobilise these provisions for the benefit of the urban environment, whether through statutory decision-making, works programs, infrastructure design or otherwise.

If I may turn to the specific matter of urban waterways, in cities waterways are a key feature of the natural environment. They are among the main ecological assets of urbanising areas. For example, within Melbourne's western and northern growth corridors most ecosystems are associated with creek corridors, grasslands or both. We have the opportunity to reconsider the treatment and status of our waterways. Historically in urban design they have been treated as drains. The tide is turning on this treatment. Communities, scientists and academics are recognising the ecological values associated with waterways. Government is slowly catching up.

Now, I refer firstly to laws for urban waterways. When implemented soundly, such laws pivot away from stringent adherence to planning trade-offs. Potentially they can achieve better integration of actions and interventions managing land, water and biodiversity. Examples of this potential can be found in the *Yarra River Protection (Wilip-gin Birrarung murrn) Act*, where objectives include ecological health and the integration of environmental, social and cultural considerations. New distinctive areas and landscape provisions under the *Planning and Environment Act* similarly give weight to environmental conservation and unique landscape features rather than triple bottom line outcomes or those not applied to waterways specifically. In each instance

environmental outcomes have higher standing and arguably greater weight than under ordinary planning decisions. In the case of the Yarra Act, the status of the river is reappraised fundamentally through recognition of the river as a living natural entity, reflecting Wurundjeri law and custom. Use of landscape-based strategic planning under that Act is distinctive in that it is driven by a community vision which may act as a form of reference model for that entity. The policy approach under the Yarra Act or other strongly place-based laws serves to reorientate environmental infrastructure away from mere encumbrance to landscape or ecological qualities. This approach is better aligned to stewardship by communities of nature and natural processes.

The second area of law and regulation I just want to briefly touch on with compelling impact on ecological assets is stormwater management. Reforms to stormwater management are key to driving improved urban environments. Urban waterways are extensively connected to stormwater systems and by extension major sections of our environmental infrastructure are directly influenced by design and operation of urban hydrology. Essentially urban stormwater systems invert the dynamics of natural hydrology and ecosystems. When it rains, instead of most water infiltrating and replenishing soil and vegetation, with a small part slowly entering healthy streams, vast fields of impervious surfaces—concrete, roads and roofs—drain nearly all water rapidly into streams, which effectively become drains. The volume and timing of urban stormwater is highly degrading to streams. Pollutant loads are connected to this hydrology.

In growth areas environmental infrastructure in the form of urban streams intersects with stormwater management. Unfortunately, driven by practice, law and policy, the outcome has largely been somewhat ornamental waterway reserves combined with conventional treatment of waterways as drains. Frequently the effect of this approach is to re-engineer natural waterways, including degrading or removing natural ecological values. For example, this dynamic has played out extensively across ephemeral plain streams on Melbourne's western fringe around new suburbs such as Tarneit. Some improvements to planning controls concerning stormwater occurred in 2018. However, these changes did not sufficiently or precisely target the key source of the stormwater problem, which is the flow regime, to enable protection and recovery of urban streams across Melbourne and other cities.

Healthy streams are essential to beneficial environmental infrastructure. Healthy streams in growth communities cannot be achieved without setting higher planning and infrastructure standards that effectively avoid urban run-off flowing into streams, retaining it or enabling its subsurface infiltration. These outcomes are technically feasible but need to be driven by regulation and policy. The new general environmental duty coming into force under the *Environment Protection Act* may contribute to these outcomes. If communities and industry can get on top of the stormwater problem, then not only will we have healthier urban waterways but we will likely capture larger volumes of water that can reduce pressures on an already overtaxed water supply system.

Finally, I applaud the committee for tackling environmental infrastructure needs in urbanising areas. Lip-service has been paid to these needs, and urban design and development models have largely been absent good faith, imagination or will to seriously achieve strong urban ecological outcomes. For those of us who grew up in the suburbs mucking around in what was left of local creeks and patches of bush there is a need for a radically reformed vision of retaining and bringing back nature to cities. I trust the committee's work can contribute to that exercise. That is my statement. Thank you, Chair.

The CHAIR: Thanks, Bruce. That is great. There is a lot packed in there.

Dr LINDSAY: Yes, there is.

The CHAIR: There is. I am going to throw first to a question from Will.

Mr FOWLES: Thank you, Chair. Thank you very much for that submission, Bruce. That is really interesting stuff. I think you have gone a fair bit further in your oral submission today around stormwater than perhaps was in your written submission, so I guess I am keen to explore a bit of that. To what extent are you saying that law reform is going to assist in the outcomes coming from the treatment of stormwater, and to what extent is it an infrastructure demand? And to the extent that it is the latter, are you drawing on engineering or hydrology advice, or is this like a more general goal you are trying to enunciate?

Dr LINDSAY: Thanks, Mr Fowles. Look, you are right, I have kind of expanded on the stormwater question beyond the submissions. I did that in part because, as you would see, our work has gone a lot to the

issue of urban waterways. With the stormwater question, there has been a lot of very good scientific work done on it by hydrologists, ecologists and engineers over the last 20 to 30 years, especially out of Melbourne University and Melbourne Water. I think there has been some progress on the issue. It is, as with many environmental issues, very much a linkage, and there are connections across urban design, engineering, building standards and law and regulation and policy. As you would know as well as I do, these things are intimately connected.

On the law reform question, which I guess is what we are quite interested in, the stormwater management has really been driven by planning standards in particular, which there has been some updating of, but in my view they really do need to go considerably further, and I say further in terms of the stream protective function of stormwater management. It really goes to the issue of design of standards around the amount of impervious surfaces and the amount of harm that is driven by water coming off those impervious surfaces into waterways and into the drainage systems.

Infrastructure standards are clearly important too, and technical standards are clearly important too—things like the drainage services schemes run by Melbourne Water. And those design standards need to inform regulation and law and policy, but in addition to that we really need to drive the overarching benchmarks and standards and metrics through the law. So colleagues at Melbourne Uni, for instance—these are scientific colleagues—have developed really interesting standards around what they call an environmental benefit index as a metric to drive higher standards around retention and basically stop stormwater going directly into waterways as a damaging threat and pressure. They are really novel standards that build on experimental work we have done over a long period of time, and that has been set into planning standards. For instance, the leading standard is up around Yarra Ranges where they have done work at a sub-catchment called Little Stringybark Creek, which is where they, with Melbourne Water, developed standards that have gone into planning controls up there that have proven reasonably successful to drive down impervious surfaces or the damaging impacts of stormwater.

The general environmental duty, which is going to be implemented or governed by the EPA, is going to be very interesting in this space because it is going to impose obligations on a range of actors—infrastructure authorities, developers and so forth—to effectively treat stormwater as a source of pollution and harm, environmentally and to human health. And there will be, I understand, guidance and so forth that will drive the standards towards preventing harms and/or minimising to the degree reasonably practicable those harms from stormwater. So that legal standard will come into force in the middle of the year, and I think it is going to be quite important in driving those kind of stream-protective and by extension ecological outcomes. Sorry, that was a very longwinded response.

Mr FOWLES: Yes. That is all right. Just on the legal end, I guess appealing to your lawyers, who would be very good at the governance thinking and the interaction of the powers that various authorities might have, what do you say about the slightly patchwork jurisdictional issues in relation to stormwater? You have got some that sit with Melbourne Water, sometimes the councils are getting involved, sometimes it is the Crown, sometimes the state government has jurisdiction. Do you have a general view about those matters and the things that we could do to improve that?

Dr LINDSAY: Yes. Those issues of fragmentation of statutory and jurisdictional responsibility I think plague environmental decision-making across a range of areas, and this is no different. Yes, that patchwork does function in many ways. Melbourne is slightly better possibly than other areas because Melbourne Water has both the catchment management authority and the water authority, and they have been quite proactive over time to drive those standards. But councils really have a fundamental role in this too, and I think often when you have got those divisions of responsibility, things will fall in the gaps and not everyone is always talking to everyone. There is a line obviously in planning responsibilities around referral authorities and things like that. My view is that those kinds of arrangements and overcoming fragmentation can always be done better, and often do have to be done better. It is well worth probably identifying where some councils and operations are better than others, and that is why I identify, for instance, what has happened up in the Yarra Ranges as a good example.

At the same time, I would also indicate that there is a difference of legal responsibilities over stormwater standards and obligations. There is also within the management of the issue differences in approach that I think are fundamental between, say, engineering approaches and the treatment of stormwater as a flood management problem, which is the historic way to do it, and the treatment of it as an ecological and hydrological problem,

which is more recent and I would argue more sophisticated and arguably where we should be going. So there are those disappointing tensions of the two within organisations that need to be resolved.

Now, planning controls in part have attempted to overcome this by having a bit of a bet both ways by saying, ‘Yes, it’s still a flood management problem and a drainage problem, but we have got to deal with the environmental side of the equation to this exercise too’. I think we really need to be driving the environmental and ecological outcomes more because there are multiple co-benefits to that. If you stop the stormwater by using stronger standards, such as through planning or the EPA Act or whatever—stop it going into streams and degrading them or having building standards that require greater retention and harvesting of stormwater—then you are going to get multiple benefits out of that. So the building authority, for instance, is another actor in this that I do not know has been well entrenched in this space, but again it is another regulator that could well come into the sphere as well.

Mr FOWLES: Thank you. Thanks, Chair.

The CHAIR: Thanks, Will. David, I am just conscious that you need to say farewell at 1 o’clock. Did you want to jump in? I am just conscious of that time and what you have got.

Mr MORRIS: I just want to ask what I think will be a relatively quick one, given what Bruce has already covered, just on the Yarra River protection legislation. Obviously the EJA—I am not sure if it was the EJA or the EDO at that stage—

Dr LINDSAY: It was the EJA at that stage, Mr Morris.

Mr MORRIS: Right. You obviously had a fair impact on that, both in the submission and your comments this morning you talked about the significance of the legislation. I am just wondering whether there are any aspects of that that you have not covered in terms of the legislation, but more importantly, what are the wider lessons from that that we can take out of it and perhaps apply elsewhere?

Dr LINDSAY: Yes. That is a very good question, Mr Morris. I draw your attention to two things primarily. The things that I think have been really positive out of that legislation, such as effectively shifting the narrative and focus, including the statutory basis of how we understand an important natural entity like that river as a living entity and to do so closely associated with and aligned with Wurundjeri law and custom, were groundbreaking. That has led to important tools under that Act in terms of a strategic planning regime, a whole raft of principles to inform how that strategic planning and so forth should play out there. Look, I think that to be honest some of the shortcomings have really been both in the design and implementation, or may play out that way. I am a bit cautious because we actually have not seen the strategic plan finalised yet, although it has been through a panel process. My view is that some of the obligations especially around driving the objectives under the Act around things like ecosystem health could have been stronger, under the Act—less of obligations about considering things and more of taking more reasonable steps to achieve things or to give effect to things. So some of the obligations could have been strengthened, in my view.

The other thing that has been a bit ambiguous I think under that legislation has been that it is strongly land use planning focused, which is clearly important to the nature of the subject matter but really if we are talking about the river as an entity, then you have got to deal with integrated resource management—so water resources management, biodiversity management and so forth. Now, the draft plan that I have seen does deal with water resources to some degree, but it is not a consideration that has been front and centre in the legislation, for instance. Really, you cannot have a law that is essentially a law about restoration of a waterway, which that law is, without dealing with water resources management, given that the Yarra in the southern basin of Victoria is the most highly diverted, heavily extracted river. So that broader suite of considerations will preferably be brought in in the longer term.

They are some of my observations. I think the only other observation I would add—and again I appreciate in the design of the legislation there is something of a compromise to be made here—is the geographic scope of the scheme effectively, because the scheme really extends to about a kilometre either side of the river, which is a rather arbitrary line when you try and manage a catchment. It has made it problematic in dealing with certain key features of that river or any rivers such as tributaries, so the geographic question could probably be revisited, but I appreciate we are dealing with an urban river and to do so on a much wider basis does have its complexities.

Mr MORRIS: Thank you very much for that. That is useful. Sarah, I might at this point, given I have got a minute to be somewhere else, say farewell and good luck for the rest of the day.

The CHAIR: Thanks, David. Bruce, I have just got a quick question around your submission talking about community organisations and NGOs being essential to the future of our environmental infrastructure and its biodiversity. Your submission also notes that the relationship between state bodies and these types of organisations are not always successful. Can you outline some areas in which your organisation sees room for improvement, particularly focusing on those areas where EJA has been directly involved? And what approach or outline would you like to see, going forward, taken to improve the collaboration between government and community organisations?

Dr LINDSAY: Thanks, Chair. I would probably put this in two categories. There is the category of governance and management I think, and not only around waterways—though that has been a particular focus—but around natural or ecological infrastructure more generally. Clearly there are many community groups with specific interests, and NGOs as well, in managing their local environment. Often they are friends groups or they can be all sorts of other ranges of groups too. I mean, there are dozens and dozens of them. The projects that we did around the Yarra, around the Barwon, around rivers in the west, waterways in the west, all were intrinsically involved in partnering with those community organisations and kind of co-designing our own approach through that. I think in terms of the law and policy reform dimension the propositions that we have put forward vary to some degree, but for instance they include bringing community organisations and NGOs with that special subject matter interest into what we might call acting as the voice, or the voices for rivers or waterways, or the voices for other places.

So grasslands are an interesting example. There are now community groups dealing with grasslands and I think that there is a real need for the state, whether it is through legal mechanisms or administrative and policy mechanisms, to recognise those organisations, especially where they are well established, and to recognise them as collaborators and partners in acting for those natural places. They typically know them well, and they have a very strong vested interest in them. They are also the key conduits between decision-makers, government and the broader community. It is typically how the broader community is brought into managing and looking after those places. Now, that can be done at a number of levels: either through loose arrangements or through more formalised arrangements, like MOUs. Or you could set up statutory arrangements, which we actually proposed in the new deal for the waterways paper as well, which was to give them a type of statutory standing or more formal, recognised standing—which is something like the Merri Creek management committee has, for instance, with Friends of Merri Creek, out on the Merri Creek. And those types of groups are very well established and have done huge amounts of work on those assets over a long period of time.

So that kind of deals with the governance management side of it and, I think, bringing groups in in a formalised and structured way to governance and management. On the other side of the equation—I think we might put this at a more operational level—our groups got quite well involved and heavily involved in the operation and management of parks and public lands and doing lots of really good restoration works, and there have been real hiccups around how statutory authorities, such as public land managers, set up their relationships with those organisations and treat them as well. They have treated them more as kind of add-ons to their own work rather than as genuine collaborators. So we have proposed, for instance, agreement-making between groups that have got the capacity to do that and public agencies like Parks Victoria, and to design agreements and to oblige groups, say through statements of obligation, so that kind of agreement-making occurs.

Similar obligations, or actually more stringent obligations, are on agencies in a relationship with traditional owners, for example. But I think that is a distinctive and quite unique category. What I am largely talking about here is community organisations and NGOs. I think there is real scope to develop better, say, model agreement-making between those organisations and statutory authorities, especially where community groups and NGOs are bringing in money, for instance, and have got a clear record of capacity in terms of restoration works. It is a matter of respect at the end of the day.

The CHAIR: Thank you. Bruce, I am just conscious of time. I am just making sure Will, Danielle and Paul do not have any last questions for you before we wrap up for lunch.

Dr LINDSAY: Obviously, Chair, I am happy to take any questions on notice.

The CHAIR: Okay. No, thanks. That is very kind of you to do that. Thank you again for taking the time to come and talk to us. I hope that you will find some of the recommendations that come out of this inquiry pleasing. So, thank you. It has been interesting.

Dr LINDSAY: Thanks so much for the opportunity, Chair, and to the committee too.

The CHAIR: Thanks, Bruce.

Witness withdrew.